BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 91)

CSX CORPORATION AND CSX TRANSPORTATION, INC.,
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
—CONTROL AND OPERATING LEASES/AGREEMENTS—
CONRAIL INC.AND CONSOLIDATED RAIL CORPORATION

[GENERAL OVERSIGHT]

PETITION FOR RECONSIDERATION OF STB DECISION NO. 17 BY THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

November 9, 2004

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The Commonwealth of Pennsylvania Department of Community and Economic Development ("Pennsylvania"), acting by and through its undersigned counsel, hereby files this Petition for Reconsideration of Decision No. 17 of the U.S. Surface Transportation Board (the "Board" or "STB") in STB Finance Docket No. 33388 Sub-No. 91, decided October 20, 2004 (the "Decision"), and in support thereof states as follows:

SUMMARY

According to all notices and statements issued by the Board, the issue before the Board to be resolved in the Decision was a narrow procedural question: whether the Board would extend the five-year oversight period (the "Oversight Period") provided for in *CSX Corp. et al. -- Control -- Conrail Inc. et al*., 3 S.T.B. 196 (1998) (Merger Dec. No. 89) (the "Approval"). In the Approval the Board approved, subject to the conditions therein stated, a transaction in which CSX Corporation and CSX Transportation, Inc. (collectively "CSX"), and Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, "Norfolk Southern")(CSX and Norfolk Southern collectively, the "Railroads") acquired control of Conrail Inc. and Consolidated Rail Corporation (collectively, "Conrail") and divided the majority of Conrail's operating assets between them (such transaction, the "Transaction").

In the Decision, at pp. 9-10, the Board determined that it would not extend the Oversight Period. Pennsylvania acknowledges that whether to extend the Oversight Period is a matter committed to the Board's sound discretion. To the extent that the Decision relates solely to the Oversight Period, Pennsylvania does not seek reconsideration of the Decision, because the Board also noted at p. 11 of the Decision that it would remain open to petitions to address concerns relating to the Transaction.

However, Pennsylvania believes that the wording of the Decision relating to Pennsylvania's claims, at pp. 17-19, which is set forth in full as Appendix A hereto, may incorrectly suggest that the Board may have decided on the merits that Norfolk Southern and CSX have fully complied with their obligations under their October 21, 1997 letter agreements addressed to Pennsylvania and to the City of Philadelphia (collectively, the "Letter Agreements"). Although Pennsylvania has argued during the proceedings leading to the Decision that Norfolk Southern and CSX have failed to comply with the Letter Agreements, Pennsylvania understood from the nature of the proceedings that the Board would not reach a decision on the merits of as to whether the Railroads have complied with their obligations under the Letter Agreements. Accordingly, Pennsylvania sought only to demonstrate that there were sufficient unresolved issues that the Board should extend the Oversight Period.

For this reason, Pennsylvania requests the Board to clarify that its discussion at pp. 17-19 of the Decision, set forth in Appendix A hereto, is not a decision on the merits of that issue.

A failure to revise the Decision to make it clear that the Board did not intend to reach a decision on the merits on the effect of the Letter Agreements will render the Decision vulnerable to reversal on appeal on two legal issues: First, that the Board failed to give adequate notice that this issue would be considered on the merits, as required by the U.S. Court of Appeals for the Seventh Circuit in *Chicago, Milwaukee, St. Paul & Pacific RR v. ICC*, 585 F.2d 254 (1978); and further, that the Board had failed to follow its own recent ruling in *Morristown & Erie Railway, Inc.*, -- *Modified Rail Certificate,* FD 34054 (June 22, 2004), slip op. at p. 3, that "the Board is not the proper forum to resolve" a contractual dispute, and that "Rather, contractual disputes belong in court."

For the above reasons, Pennsylvania respectfully requests that the Board revise the Decision to make it clear that the Board did not intend to reach a decision on the merits on the Letter Agreements issue.

ARGUMENT

In *CSX Corp. et al. -- Control -- Conrail Inc. et al*., 3 S.T.B. 196 (1998) (Merger Dec. No. 89), the Board imposed various conditions, including a 5-year general oversight condition, on its approval of the Transaction. Pursuant to Merger Dec. No. 89, acquisition of control of Conrail was effected by CSX and NS on August 22, 1998, and the division of the assets of Conrail by and between CSX and Norfolk Southern was effected on June 1, 1999 (the "Split Date").

In *CSX Corp. et al. -- Control -- Conrail Inc. et al*, [General Oversight], STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 12, February 12, 2004 ("Oversight Dec. No. 12"), The Board established the schedule for public hearings on the issue of continuation of the Oversight Period. The Board stated:

> In Merger Dec. No. 89, the Board established general oversight for 5 years so that the Board might assess the progress of implementation of the [Transaction] and the workings of the various conditions the Board had imposed, and the Board retained jurisdiction to impose additional conditions and/or to take other action if, and to the extent, the Board determined that it was necessary to impose additional conditions and/or to take other action to address harms caused by the [Transaction]. See Merger Dec. No. 89, 3 S.T.B. at 217 (item 38), at 365-66, 385 (ordering paragraph 1).
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> In a recently served decision, see CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation [General Oversight], STB Finance Docket No. 33388 (Sub-No. 91), Decision No. 11 (STB served January 21, 2004) (Oversight Dec. No. 11), the Board: discussed the issues that had been raised in the fourth annual round of the "general oversight" proceeding; set the schedule for the filing of pleadings in the fifth and final annual round of the "general oversight" proceeding (comments are due on July 1, 2004, and replies are due on August 2, 2004); and announced that, to allow interested parties an opportunity to express their views for

> the Board's consideration, at least one public hearing would be held prior to June 1, 2004 (the fifth anniversary of the Split Date).

In Oversight Dec. No. 12, the Board provided for two public hearings at which interested parties could present comments to the Board: one in Trenton, N.J to review the "shared asset areas", and the second in Washington, D.C. to review remaining aspects of the Transaction.

Pennsylvania, through the undersigned counsel, participated in the hearing held in Washington, DC, and filed supplemental written comments on May 20, July 1 and August 26, 2004. The focus of Pennsylvania's oral and written comments was the failure of both Norfolk Southern and CSX to comply with the Letter Agreements, which Norfolk Southern and CSX had provided to Pennsylvania and to the City of Philadelphia to induce these governmental entities to request the Board to approve the Transaction, which was then awaiting a decision as to approval by the Board. However, Pennsylvania specified that the purpose of its submissions was to persuade the Board to continue general oversight on at least that issue. As the Board noted in the Decision, at p. 17:

> DCED [Pennsylvania] and PIDC [Philadelphia Industrial Development Corporation] contend that CSX and [Norfolk Southern] have not entirely fulfilled all of the commitments set forth in the two letters, and, consequently, have violated the "representations condition" that was imposed on the . . . Transaction. [footnote omitted] They ask us to continue oversight of the compliance with those commitments until such time as compliance is complete or the parties have resolved this issue through a negotiated settlement. See Appendix C.

At no time did Pennsylvania request the Board to enforce the terms of the Letter Agreements. Additionally, Pennsylvania advised the Board that the issue remained under discussion with the Railroads. For example, Pennsylvania's letter to the Board dated July 1, 2004, stated as follows:

> The slow pace of Norfolk Southern's response to our concerns and the absence of any follow-up on the part of CSX underscores [Pennsylvania's] belief that it is essential to have continued quarterly reporting to the Board on this specific issue so that the Board

> can monitor whether Norfolk Southern's expressed desire to try to improve the relationship with DCED will actually lead to a resolution of this issue and also monitor whether CSX will respond at all in the absence of commencement of formal proceedings against it.

For the most part, the Decision is consistent with the statements made by the Board in Oversight Dec. No. 11 and Oversight Dec. No. 12 as to the nature of the proceedings before the Board. The Decision summarizes its underlying basis at p. 10:

> Several parties that testified during this last round of oversight expressed some dissatisfaction, but their concerns generally involve situations that are unique to the party voicing them or unique to a limited area. *They do not represent the kind of systemic or structural problem that would require a continuation of general Board oversight.*

(emphasis added). The Board also stated, at p 11, that its authority to enforce merger conditions continues. It stated further:

> Although we are concluding the formal oversight process for the [Transaction], we continue to have the authority to enforce the conditions imposed on that transaction. Under 49 U.S.C. 11327, we have continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323. *Thus, the conclusion of the formal oversight process does not preclude any party from invoking our jurisdiction to address any transaction-related concerns. And we remain available to consider and, where appropriate, address any issues relating to applicants' compliance with the conditions imposed on the Conrail Transaction.*[10]
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> n10 See Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al. [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (STB served Dec. 20, 2001), slip op. at 5-6 (concluding "UP/SP" merger oversight process); Canadian National Railway Co., et al. -- Control -- Illinois Central Corp., et al. [General Oversight], STB Finance Docket No. 33556 (Sub-No. 4), Decision No. 4 (STB served Dec. 27, 2001), slip op. at 3 (concluding "CN/IC" merger oversight process).

(emphasis added)

However, after noting the nature of the relief requested by Pennsylvania at p. 17 of the Decision (quoted above at p. 5), the Board then proceeded to discuss in some detail Pennsylvania's and PIDC's arguments. The Board's discussion of these arguments is set forth in Appendix A hereto.

Pennsylvania's understanding of this discussion is that it is background for the Board's decision not to extend the five-year formal Oversight Period and that the Board, as it stated in the

Decision on p. 11, in note 10 and accompanying text, which is quoted above at p. 6, did not intend to foreclose further proceedings to deal with those issues. However, Pennsylvania is concerned that, in the absence of a formal statement in the Decision that the Board did not intend to prevent Pennsylvania from raising these issues again in either a formal petition to the Board or proceedings in court to enforce the terms of the Letter Agreements or to seek damages for the breach thereof, there is likely to be uncertainty over that issue.

Additionally, Pennsylvania submits that unless the Decision is clarified as herein requested, it contains two errors of law that will invite reversal:

First, unless the decision is clarified to eliminate preclusive effect, the Board's failure to give Pennsylvania any notice that the Board would be deciding the fundamental question of the Railroads' responsibility under the Letter Agreements would be deemed to violate principles of fundamental fairness. *See Chicago, Milwaukee, St. Paul and Pacific Railroad Company v. ICC,* 585 F.2d 254, 259-61 (7th Cir. 1978)**.**

Second, the Board recently held in *Morristown & Erie Railway, Inc., -- Modified Rail Certificate,* FD 34054 (June 22, 2004), at p.3, that a dispute between a county sponsoring the reactivation of a rail line and municipalities who asserted that the county had promised to obtain their consent before proceeding with reactivation, was a "private contractual dispute and the Board is not the proper forum to resolve that dispute. Rather, contractual disputes belong in court." If the Board does not clarify the Decision as we have requested, the Board's discussion set forth in Appendix A would raise the question of whether the Board was attempting to decide in this oversight proceeding issues of contract enforcement that the Board had decided four months ago in *Morristown & Erie Railway, Inc., -- Modified Rail Certificate*, *supra*, belonged in a state or federal court rather than before the Board.

For the reasons set forth above, Pennsylvania respectfully requests that the Board clarify the Decision to provide that the discussion at pp. 17-19 of the Decision concerning the Letter Agreements (set forth in Appendix A hereto) shall have no preclusive effect in any other proceeding.

Respectfully submitted this 9th day of November 2004

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APPENDIX A

TEXT OF DECISION, AT PP. 17-19

DCED and PIDC contend that CSX and NS have not entirely fulfilled all of the commitments set forth in the two letters, and, consequently, have violated the "representations condition" that was imposed on the Conrail Transaction.[11] They ask us to continue oversight of the compliance with those commitments until such time as compliance is complete or the parties have resolved this issue through a negotiated settlement. See Appendix C.

CSX and NS maintain that they have complied in good faith with the commitments made in the 1997 letters, and have exceeded those commitments in many respects. DCED and PIDC, on the other hand, contend that CSX and NS have not invested as much money in the specific places the railroads represented they would. However, the record shows that both CSX and NS have made substantial investments in Pennsylvania, including substantial investments in areas not previously anticipated. See the summary, in Appendix D to this decision, of the response by CSX and NS to the comments submitted in this proceeding by DCED and PIDC. Though DCED and PIDC acknowledge that CSX and NS have complied with most of their 1997 commitments, they draw our attention to certain specific commitments that they do not believe have yet been satisfied. We will address those points.

First, the letters stated that each carrier would invest substantial sums on rail-related economic development programs in Philadelphia and across the Commonwealth. The letters stated that CSX would expend a minimum of $ 1 million per year over 5 years (a total of $ 5 million), while NS would expend a minimum of $ 15 million in the same 5-year period. DCED and PIDC claim that neither CSX nor NS has yet satisfied their obligations. But both carriers have invested substantial sums in area infrastructure, and they are continuing to do so. Indeed, DCED and PIDC concede that CSX will have exceeded the $ 5 million figure once a complex land sale transaction between CSX and the Philadelphia Regional Port Authority (PRPA), valued at $ 4,960,000, takes place. And NS, in cooperation with PIDC, is constructing, at an estimated cost of $ 16 million, a new intermodal terminal at the Philadelphia Naval Business Center, to be completed and open for business in 2005. Thus, it does not appear that further oversight is necessary to hold the carriers to these financial commitments they made to Philadelphia and the Commonwealth.

Second, both letters stated that, in exchange for contractual obligations for certain levels of rail business, the carrier would work with the Department of Community and Economic Development and the Governor's Action Team and invest substantial sums on incentive programs to encourage rail-oriented industry to locate in Philadelphia and across the Commonwealth. The letters stated that CSX would expend a minimum of $ 2 million per year over 5 years (a total of $ 10 million), while NS would expend a minimum of $ 25 million in the same 5-year period. DCED and PIDC contend that CSX and NS have not fully funded these commitments. The carriers, for their part, point out that they have provided substantial funding

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[11] See Merger Dec. No. 89, 3 S.T.B. at 387, ordering paragraph 19: "Applicants must adhere to all of the representations they made during the course of this proceeding, whether or not such representations are specifically referenced in this decision."

to attract new or expanded businesses along their lines in Pennsylvania (see Appendix D), but the projects have been ones that the carriers have initiated themselves.

We do not regard the letters as imposing unqualified funding requirements on the carriers for projects designated by others. Other conditions set forth in the letters -- such as the contractual obligations for levels of traffic -- must be met. As DCED and PIDC have not even attempted to show that the contractual obligations for levels of rail business and all of the other preconditions to funding were met, they have not demonstrated noncompliance with the carriers' commitments.

Third, the NS letter discussed particular capital improvement expenditures that the carrier identified in its operating plan filed in support of the application filed in the Conrail Transaction. DCED and PIDC contend that NS has commenced only one of the four capital improvement projects to which it committed: an intermodal facility being constructed for NS by the Delaware River Port Authority. NS acknowledges that it has not undertaken, in Philadelphia, the other three capital improvement projects referenced in the operating plan. NS explains that one of the facilities (a Triple Crown facility) was constructed elsewhere in Pennsylvania, for operational reasons; another project (an automobile facility) has not been undertaken because the business necessary to justify the construction of such a facility has not developed; and the fourth project (an interlocking track connection) has not been undertaken because operational circumstances have rendered that project unnecessary. NS's letter did not state that NS would build the indicated facilities, come what may, but only that the indicated facilities were included in the operating plan that NS filed with the Board.[12] And as the Board has explained before, the details presented in an operating plan are not carved in stone; an applicant is not required to carry out every project and make every expenditure described in an operating plan.[13]

Finally, both letters indicated that the carriers would maintain employment levels in the Philadelphia area at certain levels. PIDC contends, and the carriers concede, that the projected employment levels have not been met. CSX and NS state that, while their 1997 projections were made in good faith, there are not as many railroad jobs in the Philadelphia area now as they anticipated. We do not read the letters as a carved-in-stone commitment to maintain the specified employment levels in the Philadelphia area. Like other businesses, railroads must be able to seek efficiencies; as economic circumstances change, CSX and NS must be able to make operational and financial adjustments, including adjustments in employment levels.[14] In any

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[12] See CSX/NS-20, Vol. 3B at 68-489 (filed June 23, 1997, in STB Finance Docket No. 33388)

[13] See Oversight Dec. No. 5, slip op. at 24 (noting that the Maryland Department of Transportation was "not correct in its assessment that the operating plans filed by CSX and NS were 'commitments' to achieve proposed service and infrastructure improvements within 3 years after the implementation date that must be enforced without variation."). See also Union Pacific Corp., et al. -- Control and Merger -- Southern Pacific Rail Corp., et al. [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 16 (STB served Dec. 15, 2000), slip op. at 13 ("There is no requirement that a merger applicant actually make investments in the exact places or at the precise dollar amount that it predicts it will spend in its application.").

[14] See CSX Corp., et al. -- Control -- Conrail Inc., et al., STB Finance Docket No. 33388, Decision No. 198 (STB served Sept. 19, 2001) (Merger Dec. No. 198), slip op. at 6-7 (the "Hollidaysburg" decision). See also CSX Corp., et al. -- Control -- Conrail Inc., et al., STB Finance Docket No. 33388, Decision No. 200 (STB served Oct. 4, 2001) (Merger Dec. No. 200), slip op. at 3 (denial of stay in "Hollidaysburg").

event, as CSX and NS point out, while the number of rail jobs in Philadelphia may not be at the projected levels, rail jobs in other areas of Pennsylvania are above projected levels (for instance, at NS's new hub in Harrisburg), and other employment increases within Pennsylvania have been spurred by the railroads' investments (for example, the 1,000 new jobs associated with the railroads' combined $ 20 million investment in the Philadelphia Navy Yard). See Appendix D.

BEFORE THE
SURFACE TRANSPORTATION BOARD

CSX CORPORATION AND CSX TRANSPORTATION, INC., NORFOLK SOUTHERN CORPORATION AND NORFOLK SOUTHERN RAILWAY COMPANY -- CONTROL AND OPERATING LEASES/AGREEMENTS -- CONRAIL INC. AND CONSOLIDATION RAIL CORPORATION	**Finance No. 33388 (Sub- No. 91) (General Oversight)**

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of November, 2004, the undersigned caused a Petition for Reconsideration of STB Decision No. 17 by the Commonwealth of Pennsylvania Department of Community and Economic Development to be served on the parties in the above-captioned proceeding, by electronic mail on those parties for whom a valid electronic mail address is listed in the service list for this matter, and by United States Mail, first class postage pre-paid, on the remaining parties:

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